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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re JESSICA H., a Person Coming Under  
the Juvenile Court Law.

B154439

(Los Angeles County  
Super. Ct. No. CK42319)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES

Plaintiff and Respondent.

v.

CHARLENE J.,

Defendant and Appellant,

Appeal from an order of the Superior Court of Los Angeles County.

Marilyn H. Mackel, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Charlene Johnson, in propria persona, for Defendant and Appellant.

Lloyd W. Pellman, County Counsel, Stephanie Jo Farrell, Deputy County  
Counsel for Plaintiff and Respondent.

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In this juvenile court dependency case (Welf. & Inst. Code, § 300 et seq.), Charlene J., the maternal grandmother of dependent children Jessica H. and Christiana H. (“Grandmother,” “Jessica,” and “Christiana,” respectively) challenges an order that denied a Welfare and Institutions section 388 petition she filed for modification of an order that awarded guardianship of Jessica and Christiana to their maternal great aunt, Ruth.<sup>1</sup>

We have examined this section 388 petition, and the papers Grandmother filed with it, and we conclude that she did not present a prima facie case warranting a full hearing on her petition. Therefore, the petition was properly denied.

### ***BACKGROUND OF THE CASE***

#### *1. Events Leading Up to the Children’s Permanent Placement Hearing*

This case began with a dependency petition filed on April 21, 2000, by the Department of Children and Family Services (“Department”). The petition alleged, and the court later found, that the children’s mother (“Mother”) had failed to protect Jessica from Mother’s male companions and from Jessica’s step-father, such that the child was

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<sup>1</sup> Welfare and Institutions Code section 388 states in part: “(a) Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made . . . . The petition shall be verified . . . and shall set forth in concise language any change of circumstance or new evidence which are alleged to require the change of order . . . . [¶s] (c) If it appears that the best interests of the child may be promoted by the proposed change of order, . . . the court shall order that a hearing be held . . . .”

raped by these men, and otherwise abused by them and by another of Mother's male companions. Other allegations of the petition were also found to be true (Mother's excessive physical punishment of Jessica, her failure to ensure the children's regular school attendance, her failure to obtain medical treatment for Jessica, and her male companion's physical abuse of Christiana by excessive physical punishment). Jessica was 11 years old and Christiana was 5 years old when the Department filed its petition.

At hearings on April 27, 2000 (arraignment) and May 25, 2000 (adjudication/disposition at which the children were declared dependents of the juvenile court), Grandmother was given monitored visits with the children. The children were placed in a foster home and then replaced twice due to problems between the foster mothers and Mother and Grandmother, and between Grandmother and a foster worker, with the foster parents asking that the girls be removed from their homes.

By the time of the November 22, 2000 status review hearing, the Department was reporting that the children appeared to be doing well in their third placement. The Department had investigated the possibility of placing them with a relative, including Grandmother or her sister, the children's great aunt, Ruth. Both Grandmother and Great Aunt Ruth had expressed an interest in caring for the girls.

The Department had previously recommended that the children not be placed with relatives because the placement would no longer be confidential, and the girls would be at risk due to threats made against them and their family by one of the men who raped Jessica. Additionally, the Department noted that Mother did not want the children placed with Grandmother, that Grandmother did not believe Jessica had been sexually abused,

and that the court had only given Grandmother monitored visits. As for Great Aunt Ruth, the Department noted that she already had approximately 15 children residing with her, and the Department has a policy of only allowing 6 children. At the November 22 hearing, the court ordered the Department to thoroughly investigate the possibility of having the children placed with Grandmother or with Great Aunt Ruth, and it continued the matter to December 4, 2000.

According to the Department's report for the December 4, 2000 hearing, Great Aunt Ruth, who was 50 years old at that time, had 17 people residing with her. They were all between the ages of 2 and 18, except for her 27-year-old son.<sup>2</sup> Three of these children were under her guardianship, another three were foster children placed with her by the Department, and the others were her kin of one degree or another. Great Aunt Ruth lives in a large three-level house, with 8 bedrooms and four bathrooms. The boys' bedrooms were on one level, the girls' on another level. The home was found to be neat and clean. The two Department children's services workers assigned to the Department's children who resided with Great Aunt Ruth at that time both reported the home is always neat and clean and the children are well cared for. Despite the good reports, the Department continued to recommend that Jessica and Christiana not be placed with Great Aunt Ruth because of (1) the demand that two additional children would place on her, (2) the Department's policy limiting the number of placements in a home, and (3) the fact

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Actually, Great Aunt Ruth's husband was also living with her.

that the placement of Jessica and Christiana would no longer be confidential and would place the children at risk.

The children's services worker who examined Great Aunt Ruth's home also examined Grandmother's home. Grandmother only had one person living with her, a foster child placed there by the Department. She lives in a two bedroom, one bathroom apartment, which was found to be neat and clean. The Department recommended that Jessica and Christiana not be placed with her "because [Grandmother] doesn't believe that Jessica was sexually abused in her home and therefore could not protect Jessica," and because such a placement would no longer be confidential.

At the December 4, 2000 hearing, the Department explained that the children it placed with Great Aunt Ruth are permitted to stay with her, despite the large number of other children in the home, because they were placed there long ago, prior to many of the other children being there. The Department indicated it objected to Jessica and Christiana being placed there because Great Aunt Ruth does not have anyone to assist her with the children. Mother's attorney, and Jessica and Christiana's attorney, both indicated they preferred to have the girls placed with Great Aunt Ruth, and the girls' attorney indicated there actually was help in the home, and her clients wished to be placed there. Mother's attorney indicated Mother was willing to have her visits outside of Great Aunt Ruth's home. The court ordered Jessica and Christiana placed with Great Aunt Ruth, and ordered assistance for her.

The Department's report for the 12-month status review hearing on June 4, 2001 states Jessica and Christiana were being well cared for in their placement, and each

reported that they wanted to remain with their great aunt and did not want to live with Grandmother. Grandmother told the Department that it was her turn to care for the girls. She wrote a letter to the court asking that the children be placed in her care. She stated that one of Great Aunt Ruth's sons had been arrested for rape and the police had gone to Great Aunt Ruth's house, prior to the arrest, to look for him. At the June 4 hearing, the court terminated reunification services and set a permanent planning hearing for August 31. Because the children's visits were reported by the Department to be "not very pleasant" due to conflicts between Mother, Grandmother and Great Aunt Ruth, the court ordered that these three women enroll in "Parents Beyond Conflict" and complete their participation in the program before the August 31 hearing. Visitation for Grandmother was ordered for once a month, monitored by a licensed social worker at a Department office.

## *2. Grandmother's Initial Requests for Modification and Review*

Grandmother sought a modification of this June 4 order, which was denied on June 14 because her section 388 petition for modification did not state any changed circumstances or new or additional evidence. She also filed a petition with the juvenile court for guardianship of Jessica and Christiana.

Additionally, Grandmother filed a writ petition with this court (Cal. Rules of Court, rule 39.1B), to challenge the order of the juvenile court setting a permanent planning hearing, and the court's findings. We dismissed her writ petition because we found she did not have standing to challenge the juvenile court's June 4 order since she was not the children's parent, nor their guardian. Nor had she claimed de facto parent

status, and the record did not indicate de facto parent status might be an issue. Further, we observed that the usual basis of such a writ petition (a challenge to the reunification services provided by the Department and the appropriateness of terminating parental rights) was missing since Grandmother was not entitled to, and did not receive reunification services, and she had no parental rights vis-à-vis the children. Rather, the basis of her petition was that the children had been placed with Great Aunt Ruth rather than with her.

### *3. The Department's Permanent Placement Assessments and Reports*

According to the Department's report for the August 31, 2001 permanency planning hearing, Jessica and Christiana appeared to be very happy living with Great Aunt Ruth and the other children in her home, they stated they want to continue to live with her, and all of the children living in the home appeared to be well cared for. The Department recommended that Jessica and Christiana be placed in a guardianship with Great Aunt Ruth, and Mother's parental rights not be terminated.

At the hearing, the court appointed Great Aunt Ruth guardian of Jessica and Christiana, did not terminate parental rights, and continued monitored visits for Mother and Grandmother in a neutral setting. The court ordered that Grandmother not talk to the girls about this case, and not talk to Christiana while she is at school (Grandmother works in the library at the school Christiana attends).

This permanent plan was reviewed by the court on December 3, 2001. The court determined the plan should continue in effect.

4. *Grandmother's Subsequent Petition for Modification and Application for De Facto Parent Status*

On October 9, 2001, Grandmother filed a section 388 petition for modification of the court's August 31, 2001 order that placed the children under Great Aunt Ruth's guardianship. By her petition, Grandmother sought to have the court order the children placed in her own custody.

Grandmother also filled out an application for de facto parent status and included it with her section 388 petition for modification. The application states that Grandmother has had visits with Jessica and Christiana since they were born, the girls have spent holidays at her home, and she has purchased clothes and toys for them and given money for their needs. According to the application, when Grandmother had her May 2001 visit with the children, Great Aunt Ruth stated she would agree to Grandmother's having custody of the children, and this was "also stated to Ms. Josie Hill CSW [but] was never presented to the [] court." Grandmother objected to the court's determination on August 31 that the children were in a stable home. (Actually, the court stated the girls were stable, in a good home, and things were going well.) Grandmother alleged that there were adults living in Great Aunt Ruth's home that the Department did not know about, and that is why Great Aunt Ruth did not want Grandmother asking the children about what goes on in her house.

Included with Grandmother's application for de facto parent status and petition for modification of the August 31 court permanent placement order was a letter, dated September 3, 2001, that Grandmother had written to the judicial officer handling this



case. The letter was written in response to the court's August 31 orders. The letter was accompanied with numerous letters of character reference from personnel at the school where Grandmother works in the library, and from a neighbor.

In this seven page letter, Grandmother reported that two of Great Aunt Ruth's grandsons were excluded from school because they had ringworm (Grandmother did not give a specific date when this occurred); stated that there is a school 3 or 4 blocks from where Great Aunt Ruth lives and therefore Christiana does not need to attend the school where Grandmother works; asserted that the negative things said about Grandmother in the Department's reports are false, to wit, that it is not true that Grandmother knew about the things that caused Jessica and Christiana to be removed from Mother's home and did nothing about them; asserted that the girls were coerced into choosing to live with Great Aunt Ruth because Great Aunt Ruth permits them to have unauthorized visits with Mother; asserted that after receiving guardianship, Great Aunt Ruth told Grandmother that Grandmother can raise the girls; and alleged that Great Aunt Ruth's home is not stable, and although Grandmother wrote to the Department in January 2001 to explain about the problems in the home, the Department covered them up.

The section 388 petition was denied on October 19, 2001. The court determined the petition failed to contain new evidence and failed to state facts that show a change of circumstances since the August 31 hearing; rather, said the court, the petition stated general conclusions without specific facts to support those conclusions, it addressed issues already addressed by the court, and it did not state facts to support a finding that changing custody to Grandmother would be in the children's best interests.

### *5. Grandmother's Appeal*

On November 13, 2001, Grandmother filed a notice of appeal. The notice states she challenges orders made on (1) August 31, 2001 (the permanency planning hearing at which the court ordered that Great Aunt Ruth would be Jessica's and Christiana's legal guardian, and (2) September 28, 2001, when the court signed the letters of guardianship. However, an attachment to her notice of appeal states she is "[a]ppealing the denial of [her] 388 petition filed October 9, 2001," and her briefs address that denial. In any event, we note that a challenge to the August 31, 2001 orders would be untimely (Cal. Rules of Court, rule 39.1 (f)).

### ***DISCUSSION***

This appeal should be denied on both procedural and substantive grounds. Procedurally, Grandmother's "briefs" are so defective that they warrant outright affirmance of the order that denied her October 2001 section 388 petition for modification. California Rules of Court, rule 14 (a) (2) (C) provides that an appellant's opening brief must "provide a summary of the significant facts limited to matters in the record." Here, the statement of facts in Grandmother's opening brief consists of five pages of citations to the clerk's and reporter's transcript. Apparently there is also an implied suggestion that we put together a statement of facts for her. Assuming *arguendo* that an appellant can rely on his or her reply brief to cure such a defective opening brief, the statement of facts in Grandmother's reply brief does little to cure her problem.

Substantively, Grandmother's briefs do not warrant reversing the order that denied her October 2001 petition for modification of the permanent plan. To gain a hearing on a

section 388 petition, the petitioner must make a prima facie showing both that there are changed circumstances or new evidence, and that the change requested by the petitioner is in the best interest of the child. (*In re Zachary G.* (1999) 77 Cal.App.4<sup>th</sup> 799, 806.)

The petition is liberally construed on such matters. (*Ibid.*) A reviewing court will not reverse a trial court's decision on a section 388 petition absent a showing by that the trial court abused its discretion. (*In re Casey D.* (1999) 70 Cal.App.4<sup>th</sup> 38, 47.)

Here, a review of Grandmother's petition, including the matters set forth in her application for de facto parent status and the September 3, 2001 letter to the court, shows that she has not made such a prima facie showing. These papers address matters that occurred prior to the time the juvenile court ordered a guardianship for the children, and they challenge the validity of certain pre-guardianship representations made to the court. These matters do not constitute the "change of circumstance or new evidence" required by section 388. Moreover, Grandmother did not demonstrate that it would be in Jessica's and Christiana's best interests to remove them from the home where they state they are happy, and where the Department found them to be well cared for and doing well. Grandmother's reliance on an understanding she alleges she had with Great Aunt Ruth in May 2001 that she (Grandmother) could have custody of the children, even if such understanding actually existed, does not warrant a hearing on the section 388 petition. It was not Grandmother's and Great Aunt Ruth's place to decide with whom the children will live. That is a matter for the court.

Nor did Grandmother make a showing that she is entitled to de facto parent status. A de facto parent is "a person who has been found by the court to have assumed, on a

day-to-day basis, the role of parent, fulfilling both the child's physical and psychological needs for care and affection and who has assumed that role for a substantial period."

(Cal. Rules of Court, rule 1401 (a) (8).)<sup>3</sup> The court applies a preponderance of the evidence standard to determine if a person is a de facto parent. (*In re Joshua S.* (1988) 205 Cal.App.3d 119, 125.) Here, Grandmother made no showing that she fits within this description of a de facto parent.

### ***DISPOSITION***

The order denying Grandmother's October 2001 Welfare and Institutions section 388 petition for modification is affirmed.

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CROSKEY, J.

We Concur:

KLEIN, P.J.

ALDRICH, J.

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<sup>3</sup> De facto parents are permitted to be present and participate at disposition hearings and subsequent hearings at which the dependent child's status is at issue; the de facto parent may be represented by counsel, and at the court's discretion, appointed counsel, and may also present evidence. (Cal. Rules of Court, rule 1412, (e).) In contrast, a relative who is not a de facto parent may be present at hearings and address the court. (*Id.*, rule 1412 (f).)